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COPARCENERSHIP OF DISQUALIFIED SON UNDER THE MITAKSHARA.

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When Colebrooke translated the Digest of Jagannatha and later the Mitakshara and the Dayabhaga, he borrowed the term *coparcener* from English Law for the purpose of describing the members of a joint family who are entitled to demand partition of the family property. In some places he used the old form, *parcener.*[1] In some places he used the more familiar term *coparcener*[2] which has now definitely established itself in the English vocabulary of Hindu Law. It is clear that he had no intention of importing into Hindu Law the technical English idea of coparcenary, for coparcenary never arises under English Law except under a joint inheritance, but joint descent is not a necessary condition of co-ownership of joint family property under Hindu Law. The essential connotation of the term, so far as Colebrooke was concerned, lay in the right to demand partition, the object being to distinguish shareholders in the joint family estate from the inferior category of members who are merely entitled to maintenance. It is certain that Colebrooke had no intention of associating the idea of coparcenary with the special incidents of joint family relationship under the Mitakshara, for he used the term in various places in his translation of the Dayabhaga also.[3]

In course of time, precisely how and when it is unnecessary now to consider, the term *coparcener* and its variants came to acquire a special affinity with the rule of survivorship under the Mitakshara law. In a well-known passage in the judgment of the Privy Council in the *Shivaganga case*[4], Lord Justice Turner says:

> "There is coparcenership between the different members of a united family and survivorship following upon it."

1. Colebrooke's Digest. Book V, Placita 367, 376, 377, 394.
2. " " Placitum 391.
3. Dayabhaga, Colebrooke's translation, Ch. VI, S. 1, Placita 7, 26, 27, 30, 31, 37, 39; Ch. VI, S. 2, Placitum 13; Ch. VII, S. 2, Placitum 4; Ch. XI, S. 1, Placita 29, 30.
4. *Katama Nachiar* v. *Raja of Shivaganga*, (1863) 9 Moo. I.A. 539, 615.

The change in the meaning of the term *coparcener* is interesting. Under English Law coparcenary is sharply differentiated from joint tenancy. The former never arises except under a joint inheritance. The latter never arises except under a joint grant. In coparcenary there is no right of survivorship, but the *jus accrescendi* is the distinctive feature of a joint tenancy. It is true that Colebrooke's coparcenary is not the same as the coparcenary of English Law, but Colebrooke applied the idea of coparcenary to both schools of Hindu Law. In blending coparcenary and survivorship, therefore, the judgment in the *Shivaganga case* was taking a term imported from English Law by Colebrooke but giving to it a meaning which differs both from Colebrooke and the English Law.

The judgment in the *Shivaganga case* was in 1863. Five years later, in the judgment of the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee*[1] another development emerges in the connotation of the term *coparcener*. Sir James Colville, in his judgment in this case, says:

> "The estate of two widows, who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are therefore in the strictest sense coparceners and between undivided coparceners there can be no alienation by one without the consent of the other."

The reference to *coparceners* in this case, even though there was no question of a joint family, was a complete departure from Colebrooke. Coparcenary and joint tenancy have here become practically synonymous. Further a new element has come in, that coparcenary property cannot be alienated by one coparcener without the consent of the others. This emphasises the deviation from Colebrooke strikingly, for Colebrooke recognised coparcenary under Dayabhaga law and under Dayabhaga law one coparcener can alienate his share without the consent of the others.

Has Sir James Colville's conception of *coparcenary* been maintained in later cases? Clearly not, for the proposition enunciated by him is flatly contradicted by the law relating to impartible estates.

There was a tendency until comparatively recently to deny the possibility of coparcenership in impartible estates. It was categorically asserted, for instance, in *Rama Rao* v. *Rajah of Pittapur*[2] when the Privy Council was still under the spell of *Sartaj Kuari's case*[3] that impartibility is the inevitable negation of coparcenership. But this view has now been abandoned. In *Konammal* v. *Annadana Jadaya Gounder*[4], Sir John Wallis says:

> "The *Betia raj case* contains observations denying that the junior members of the family have any coparcenary interest in the impartible estate even for purposes of succession, but these observations have been explained in Lord Dunedin's judgment in *Baijnath Prasad* v. *Tej Bali Singh*.

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1. (1867) 11 Moo. I.A. 487, 515, 516.
2. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778, 783 (P.C.).
3. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
4. (1927) 54 M.L.J. 504: L.R. 55 I.A. 114: I.L.R. 51 M. 189, 201 (P.C.).

Later in the *Jheria case*, *Shiba Prasad* v. *Rani Prayag Kumari*[1], Sir Dinshaw Mulla says:

"Though the other rights, which a coparcener acquires by birth in joint family property, no longer exist, the birth right of the senior member to take by survivorship still remains."

What in this state of the authorities is the connotation of the term *coparcener* under Hindu Law?

The English Law association of coparcenary with joint inheritance is clearly inapplicable to Hindu Law. The notion that coparcenary is a relationship between members of a joint family, though supported by Colebrooke, is contradicted by the judgment in *Bhugwandeen Doobey's case*[2]. It is generally assumed that the right to partition and the right to restrain alienation are essential incidents of coparcenary, but any generalisation to this effect is clearly inconsistent with the law relating to impartible estates. The common tendency nowadays is to treat coparcenary as the technical description of the joint tenancy that prevails in an undivided Mitakshara family, but the usage originated by Colebrooke still persists and passages can be found in any text book on Hindu Law explaining the distinctions between coparcenary under Mitakshara law and coparcenary under the law of the Dayabhaga.

The conclusion is perfectly plain. The term *coparcener* has the deceptive appearance of a term of art, but it has really no unchangeable and unchallengeable legal connotation. Any quarrel about the meaning of this expression will be merely the old story of the chameleon, all will be right and all will be wrong. Would it not be advantageous to accept the advice given by Lord Dunedin in *Baijnath Prasad's case*[3], and avoid verbal confusion by dropping this unhappy term wherever possible, concentrating attention on the substance of whatever legal issue may be in question?

A striking commentary on the wisdom of Lord Dunedin's warning is furnished by the recent judgment of the Madras High Court in *Amrithammal* v. *Vallimayil Ammal*[4].

The dispute in this case related to a bequest. The testator Veerakumara was a member of a joint family consisting of himself and, apart from female members, his only son Chellakrishna. This son was found to be a congenital idiot, though he had enough understanding to marry and beget two sons. When the father Veerakumara died, the son Chellakrishna was a married man, but his sons were born only later. Veerakumara bequeathed his property, which was wholly ancestral, to his widow Vallimayil Ammal with absolute rights. The validity of this bequest was the crucial question in the litigation.

The suit claim was for partition of the property bequeathed to Vallimayil Ammal. The plaintiff was a daughter's daughter of Veerakumara. She claimed that her grandfather's property became the stridhana of her grandmother by virtue of the bequest, and that

1. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399, 1413, 1414 (P.C.).
2. (1867) 11 Moo. I.A. 487, 515, 516.
3. (1919) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228, 243 (P.C.).
4. (1942) 2 M.L.J. 292 (F.B.).

she was entitled to a share in the estate as stridhana heir. This claim was untenable if the bequest to Vallimayil Ammal was not valid, for in that case succession would be traced to Veerakumara and in the circumstances of the case the daughter's daughter would have no claim to succession. Was the bequest valid?

The lower Courts had upheld the bequest. They proceeded on the footing that Veerakumara was virtually the sole owner of the properties, as the son Chellakrishna was admittedly precluded from claiming partition by his mental disability. The appeal to the High Court came up before Venkataramana Rao, J., who directed the case to be posted before a Bench. When the appeal came up for hearing before the Bench it was adjourned in order to await the decision of the Privy Council in the *Venkatagiri maintenance case*[1]. It was presumably expected that the judgment of the Privy Council in this case would clarify the law regarding the incidents of coparcenership. After the disposal of the *Venkatagiri maintenance case*, when the appeal was again taken up, it was posted for hearing before a Full Bench. It was heard by a Full Bench, Sir Lionel Leach, C.J., Krishnaswami Aiyangar and Somayya, JJ. The Full Bench held that the bequest of Veerakumara was inoperative and that the plaintiff's claim to partition was unsustainable. The conclusion proceeded wholly on the basis that the son Chellakrishna was a coparcener, notwithstanding his mental infirmity, and that the bequest by the father was consequently inoperative.

The learned Chief Justice in the first sentence of his judgment, says:

> The question raised in this appeal is whether a congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share."

Lower down:

> "If Chellakrishna was in law a coparcener with his father the latter admittedly has no right to bequeath the property held by him to his widow, because in such circumstances it would constitute the joint property of father and son."

The statement in the judgment regarding the admission by counsel must of course be accepted. But it seems incredible that the admission referred to could have been made by experienced counsel, with the decisions relating to impartible estates staring him in the face. The statement of the law by the learned Chief Justice, regarding the inalienability of coparcenary property, reads very much like the statement of the law by Sir James Colville, in *Bhugwandeen Doobey's case*[2]. But the coparcener in the Privy Council case was a widow, who, on account of the limitation imposed on her estate had no power of disposal which would extend beyond her lifetime. The position of male coparceners is obviously different. Ordinarily, no doubt, the operation of survivorship rules out the possibility of a bequest. But the incompatibility of a will with the rule of survivorship is by no means universal. This is perfectly clear from the law relating to impartible estates. It seems probable that the law relating to impartible estates was regarded as some-

1. *Raja Krishna Yachendra* v. *Raja Rajeswara Rao*, (1942) 1 M.L.J. 132; I.L.R. (1942) Mad. 419 (P.C.).
2. (1867) 11 Moo.I.A. 487.

thing altogether exceptional, and that the non-bequeathability of partible coparcenary property was regarded as unchallengeable. That, however, is the crux of the whole case; and it is here that the unhappy term *coparcener* was responsible for confusion of thought. Assuming that the son Chellakrishna was a coparcener entitled to take by survivorship, was the coparcenership of such a character as to deprive the father of testamentary power? It is strange that this question failed to receive any attention either from counsel or from the Judges.

The insistence on coparcenership has a significance, not merely from the point of view of the son, but from the point of view of the father also.

The coparcenership of the father cannot be less effective where the son is disqualified than in a case where the son is free from disqualification. Clearly, therefore, the father Veerakumara was entitled to exercise the right which belongs ordinarily to any coparcener, the right to sever jointness. If authority is necessary for this proposition it is to be found in *Venkateswara Pattar* v. *Mankayammal*[1]. The joint family in this case was like the joint family in *Amrithammal's case*, a family consisting of a father and a lunatic son, though the lunacy of the son in the earlier case was supervenient and not congenital. Varadachariar, J., referring to a partition effected by the father, said:

> " Once the conclusion is reached that a disqualified person may be a coparcener enough to take by survivorship, there is no reason why we should deny the possibility of such a severance of the joint status as would put an end to the right of succession by survivorship."

It must be noted that a partition in the circumstances of a case like the present can be effected by the unilateral act of the father. If the father filed a suit for partition against a son who is admittedly excluded from a share, he would be rightly laughed out of Court. He may of course set apart a portion of the property for the disqualified son if he so desires, but he is under no obligation to do so, as the son has admittedly no claim to divide the estate.

This aspect of the matter was considered recently in an Allahabad case, *Bhagwati Saran* v. *Parmeshwari*.[2] The joint family in this case consisted of two brothers, Har Shankar and Gauri Shankar. Gauri Shankar was a married man but had become insane. The family property had been divided and certain items had been allotted to the insane brother. Gauri Shankar had died leaving a widow and the dispute related to the widow's right of succession. As Har Shankar survived his insane brother, if the status of jointness continued, the widow would have no right of inheritance. The Judges held that the status of jointness had terminated and that the right of survivorship was inapplicable. They cited in support of this conclusion the decision of the Madras High Court in *Venkateswara Pattar* v. *Mankayammal*[1]. The insane brother had actually received a share of the properties, but the Judges conceded that he had no legal claim to division and that

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1. (1934) 69 M.L.J. 410 (420).
2. (1942) A.L.J. 197.

Har Shankar's right to sever jointness was not conditional on his sharing the family estate with his insane brother.

Allsop, J., says:

"I see no justification for the proposition that a member of a joint Hindu family who is ordinarily entitled to disrupt the family at will should be deprived of that right merely because the result would be that he could take the whole family property as a result of the disruption and leave to the other brother only a right to maintenance" (Page 239).

This argument is even more clearly applicable to a father. Whether he exercises his right as coparcener or acts by virtue of his higher status as father, he has unquestionably the right, by his mere unilateral declaration to appropriate the whole of the family property to his exclusive ownership subject of course to the disqualified son's right to maintenance. Suppose Veerakumara had made this declaration of severance and had then made the bequest in dispute, would the validity of the will be open to question?

There was a Madras case recently, *Narayana Rao* v. *Purushottama Rao*[1] in which a joint family consisted of father and son and the father desired to make some provision for another son who had been given away in adoption. The undivided son objected, whereupon the father sent a notice to the son severing jointness and then bequeathed his share in the family property to the adopted son. The bequest was upheld. The father had appropriated his share to his exclusive ownership and the restraint of survivorship had therefore disappeared. The bequest in this case was of a half share only, but that was because the father's coparcenary interest extended to a half share only. Where the son is disqualified the position is obviously different. The legal position may seem strange, but that is because the coparcenership of a disqualified son is itself a strange state of affairs. Where the undivided coparcenary interest of the father is liquidated by severance of jointness, what is it that falls to his exclusive ownership? Clearly the whole property, and on the principle of *Narayana Rao* v. *Purushottama Rao*[1], the whole of this becomes proper subject-matter of testamentary alienation.

The severance of jointness and the bequest are legally distinct transactions, but there is no reason why they should not be embodied in the same instrument. Such a case came before the Madras High Court in *Aiyavier* v. *Subramania Aiyar*[2].

The dispute in this case related to a settlement by the head of the family, who was the grandfather of the other coparceners. The settlement was found to be a composite transaction, being a combination of a partition and a gift, a partition effected unilaterally by the settlor in his character as grandfather, and a gift by the settlor of the property appropriated to his sole ownership by virtue of the partition. The Judges upheld the gift, holding that the partition and gift were each unimpeachable and that the combination of the two in one instrument was not legally open to challenge.

1. (1938) 1 M.L.J. 45: I.L.R. (1938) Mad. 315.
2. (1917) 32 M.L.J. 439.

Applying these considerations to Veerakumara's bequest, it is clear that it was entirely within the power of the testator to appropriate the whole of the property to his exclusive ownership and then to exercise over it an unimpeachable testamentary power. No decree of Court, no agreement with others, no external aid or sanction of any kind, was necessary.

If so much is conceded would it be in accordance with established legal principle to insist on the ritual of a formal severance? There is a helpful parallel in the law relating to alienation by a limited owner. She can surrender the whole of the property, whereupon the inheritance will vest in the reversioner and he will consequently acquire the power to alienate it to whomsoever he likes. Suppose she makes a gift of the whole property to a stranger with the consent of the reversioner. It is now settled law that such an alienation must be upheld[1], for the law looks at the substance of a transaction and not the form, and the gift of the whole estate with the reversioner may be treated, and where necessary should be treated, as a surrender by the limited owner followed by an alienation of the property by the reversioner. The principle here is obviously of general application. If it is within the unaided power of a person to achieve a particular object, the description which he gives to a transaction seeking to achieve that object is not legally a matter of great consequence. If Veerakumara could have put his bequest beyond dispute by inserting a recital of severance of jointness in his will, his omission to insert that recital cannot be a ground for nullifying that bequest. The Court is entitled to read that recital into the will, and in ordinary cases it would be its duty to do so.

So far as the decision in *Amrithammal's case* related to the validity of Veerakumara's bequest, and this was really the only practical issue in the case, the judgment of the Full Bench was vitiated by a confusion of thought regarding the connotation of the elusive term, *coparcener*, and, with great respect to the learned Judges, is indefensible. If Chellakrishna was a coparcener, his coparcenership was not of such a character as to be an impediment to his father's testamentary power. The argument of Sir Richard Couch in *Sartaj Kuari's case*[2], that the right to veto alienation must stand or fall with the right to partition, however open to criticism it may seem to be in relation to impartible estates, is really unanswerable in regard to partible coparcenary property of a joint family. Ordinarily in the case of partible property, coparcenership will be full and effective. The disqualified son, however, is the exception that proves the rule. The father's power of disposal over coparcenary property *vis a vis* the disqualified son, the power of disposal of the holder of an ancestral impartible estate *vis a vis* an expectant coparcener, the power of disposal of the father as against the son in relation to self-acquisition, all stand on the same legal footing. Coparcenership in these cases is not a

1. *Rangasami Goundan* v. *Nachiappa Goundan*, (1918) 36 M.L.J. 493: L.R. 46 I.A. 72: I.L.R. 42 Mad. 523, 536 (P.C.), *Yeshwanta* v. *Antu*, (1934) I.L.R. 58 Bom. 521.

2. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272, 287 (P.C.).

restraint on alienation because it is imperfect and ineffective. It is worthy of note, in this connection, that Vijnaneswara recognises the right by birth of the son in all property belonging to the father whether self-acquired or ancestral, but he confines the *nishedhadhikara,* the son's right to veto alienation, to the part of the paternal estate which is ancestral in the hands of the father, for it is only here that *janmanaiva swatwa,* right by birth, has the character of a *sadrisam swamyam,* an equal and independent coparcenership.

So far it has been assumed that Chellakrishna had a right by birth in the properties of his father, and was a coparcener in the limited sense of being entitled to take by survivorship if his father predeceased him. The correctness of this assumption however is by no means patent. Chellakrishna's idiocy was congenital, as in fact idiocy must always be, and the recognition of right by birth in the case of a congenital idiot is a much more difficult question than one might suppose it to be, judging from the decision in *Amritham-mal's case.*

The dissociation of the right to take by survivorship from the right to claim partition, in the case of a person affected by disqualification, was first definitely enunciated in the judgment of the Madras High Court in *Muthuswami Gurukkal* v. *Meenammal*[1]. The disqualification in this case was due to supervenient insanity. Gangadhara and Subbayya were father and son, members of an undivided Mitakshara family. Subbayya died and then the father Gangadhara. Each left a widow. Subbayya's widow claimed the family properties. She contended that her father-in-law was a mere maintenance holder and that on the death of her husband who was the only effective owner, the family property descended to her as heir. This claim was rejected by the Judges. It was held that the insanity of Gangadhara might have been a bar to partition if any question of partition had arisen, but it could not prevent him from getting the benefit of survivorship when he became, as he did, the last surviving male member of the family. The decision in this case has been followed by the Patna High Court in *Dilraj Kuar* v. *Rikheswar*[2], by the Bombay High Court in *Vithaldas* v. *Vadilal*[3] and by the Allahabad High Court in *Mool Chand* v. *Chahta Devi*[4]. It seems unlikely in view of this weight of authority, that any argument will be allowed by Judges if the question again arises for decision, but it may be worth noting that the logic of the matter is not wholly on one side. Before the judgment in *Muthuswami Gurukkal's case,* in *Tirbeni* v. *Muhammad*[5], the Allahabad High Court took the view that the right to partition is unalterably fixed by the coparcenership accruing at birth, and that the right could not be affected by supervenient insanity. This of course was a misapplication of the rule that a vested estate cannot be divested, and it is unquestionably opposed to the law regarding disqualification for partition laid down in the Smritis. The Judges in *Muthuswami Gurukkal's case* conceded that the right to partition must depend on the conditions existing at the time of partition,

1. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464.
2. (1934) I.L.R. 13 Pat. 712.
3. (1935) 38 Bom.L.R. 257.
4. I.L.R. (1937) All. 825 (F.B.).
5. (1905) I.L.R. 28 All. 247.

and though existing at birth might be taken away by supervenient insanity. This may well be the Achilles' heel of the reasoning which the Judges adopted. If the effectiveness of vested coparcenership may be weakened by supervenient disability for purposes of partition, why should not a similar weakening be recognised for other purposes? What is the compelling justification for according to survivorship a greater security than partition? If disability existing at partition bars the claim to a share, why should not survivorship be defeated by the existence of a disability existing at the time when the right would otherwise become operative? It is not suggested that the judgment in *Muthuswami Gurukkal's case* should be reconsidered in the light of this criticism. But it may be useful to note that there is something to be said for the view which failed to find favour with the Judges who decided that case.

Whatever the position may be in regard to supervenient disqualification, would congenital disability be governed by the same considerations? Until the judgment in *Amrithammal's case*, the right to take by survivorship was never recognised in cases where the disqualification was congenital. What is more, in *Pudiava Nadar* v. *Pavanasa Nadar*[1], a Full Bench of the Madras High Court definitely negatived the right of survivorship in a case of congenital blindness. The Judges in *Amrithammal's case* have dissented from this Full Bench judgment on the ground that it is inconsistent with more weighty pronouncements. They have held that there is a coparcenership in persons affected by disqualification, and a right of survivorship founded on that coparcenership, whether the disqualification is congenital or supervenient, provided there is fitness to marry. The congenitally idiot son Chellakrishna was qualified to take by survivorship according to this view as he married and begot two sons. In taking this view of the law the Judges were influenced mainly by two authorities. One is the judgment of the Madras High Court in *Krishna* v. *Sami*[2]. The other is the statement of the law regarding disqualified members of a joint family in the Saraswati Vilasa.

The decision in *Krishna* v. *Sami*[2] was given about sixty years ago, in 1885, in the spacious days when the corpus of Hindu Law was still being built up, and considerable discussion was permissible and necessary on many matters which would now be regarded as mere commonplace. Reading that judgment in retrospect one may well feel a sense of wonder that so much argument should have been necessary on so simple an issue. The dispute related to a claim to partition. The property had originally been held in coparcenary by two brothers, Sami Reddi and Venkatasami Reddi. Sami Reddi died leaving a son who was congenitally deaf and dumb. The effective control of the family property passed then into the hands of Venkatasami Reddi's branch of the family. The plaintiffs in the case were two sons of Sami Reddi's disqualified son. Whether their father had married before the death of their grandfather Sami Reddi is not clear. Admittedly however the birth of the plaintiffs took place only after the death of Sami Reddi. In these circumstances their claim to partition was opposed on the

1. (1922) 43 M.L.J. 596: I.L.R. 45 Mad. 949 (F.B.).
2. (1885) I.L.R. 9 Mad. 64 (F.B.).

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ground that the family property had become vested in Venkatasami Reddi's branch of the family on the death of Sami Reddi, and that this vested right could not be divested by the subsequent birth of sons to Sami Reddi's disqualified son. The Judges rejected this contention and upheld the claim of the plaintiffs to a half share of the property.

But for the fact that the Bombay High Court had taken in *Bapuji Lakshman* v. *Pandurang*[1], on substantially similar facts, a view different from that which the Madras Judges adopted, one might well say that the question raised in *Krishna* v. *Sami*[2] could have been answered in one way only. The superficial plausibility of the contention, which Sir Charles Turner and his colleagues rejected, was based practically wholly on the reasoning of *Kalidas* v. *Krishna*[3]. There is a fundamental distinction, however, between the law of the Dayabhaga, with which *Kalidas* v. *Krishna*[3] was concerned, and the law of the Mitakshara with which the Madras High Court had to deal. *Kalidas* v. *Krishna*[3] had to deal with a claim to divest a vested inheritance. *Krishna* v. *Sami*[2], on the other hand. had to deal with the incidents of corporate ownership in an undivided Mitakshara family. The suit property belonged to a joint family consisting of two branches, descended from two brothers. The composition of this joint family might fluctuate, either by augmentation consequent on the operation of right by birth, or by diminution consequent on the operation of survivorship. But the joint family itself was a permanent corporate entity distinct from the mere arithmetical summation of the individuals composing it. Coparceners might come and go, but the family itself would remain unchanged subject to the possibility of being destroyed by partition. Some members of the family might be coparceners, others might be entitled to maintenance only. But the property belonged to the joint family and not to the individual members, and all persons coming into it, either by marriage as in the case of the wives, or by birth as in the case of the sons, would get the rights appropriate to their status as members of the joint family. The plaintiffs in the case were clearly entitled to the benefit of this principle. They were personally free from disqualification, and when they were born into the family they acquired the status of coparcenership and the rights attaching to that status even though they were the sons of a disqualified father. The law is explicitly laid down by the law-givers and the Mitakshara, that the status of an aurasa son, himself free from defect, is unaffected by the disqualification which may affect his father.

The apparent reasonableness of the contention, which the Judges took so much trouble to refute, arose from the fallacious supposition that the death of Sami Reddi, leaving no representative in his branch of the family except a disqualified son, had the effect of transferring the family property from the major family, consisting of himself and his brother, to the minor family consisting of his brother's descendants. This, of course, was a fundamental misapprehension regarding the structure of a Mitakshara

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1. (1882) I.L.R. 6 Bom. 616.
2. (1885) I.L.R. 9 Mad. 64 (F.B.).
3. (1869) 2 Beng. L.R. 103 (F.B.).

joint family and the incidents attaching to corporate ownership among its members. The branch of the family descended from Sami Reddi may have withered, but it was not dead. The assumption that ownership had been deflected to Venkataswami's branch of the family, failed to distinguish between the coparcenary and the joint family. This is to-day a common place of Mitakshara law, but of course the platitude of today may have been a novelty sixty years ago.

It was sufficient for the purpose of the judgment in *Krishna* v. *Sami* to point out that there is no such thing as inheritance, or vesting of property in individuals, inside a Mitakshara joint family. The Judges did point this out and the judgment might well have stopped there. Unfortunately, after a survey of the relevant textual authorities, the learned Judges summed up the legal position regarding the status of a disqualified member of a joint family in some attractive but misleading figures of speech:

"There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood; there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent or may come into existence at a future time as it does in the case of the afterborn son. When it comes into existence, either in the person of the formerly disqualified heir or of his sons, it is to be recognised. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies, he is at once entitled to be recognised as a member of the coparcenary. The only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested[1]."

This statement of the law is largely based on the Saraswati Vilasa which will be considered presently. But one thing must be cleared up immediately. Did the Judges mean that the father of the plaintiffs was excluded by his disability from the status of coparcenership, only for purposes of partition, and for the purposes of survivorship was to be regarded as a coparcener? That is how the Judges in *Amrithammal's case* have used the authority of *Krishna* v. *Sami*. Is that correct? If the disqualified son of Sami Reddi was entitled to the benefit of survivorship, notwithstanding his disability, that was a straight answer to the argument based on divesting a vested estate. Why then did the Judges go on to argue that the case before them was an exception to the rule that a vested estate cannot be divested? Immediately after the passage quoted above, Sir Charles Turner says:

"That the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the law of the Mitakshara, appears to be established by admitted rules and by judicial decision."

Then he goes on to give various illustrations, and winds up by a pointed reference to the *Berhampore case*,[2] where the estate vested in Raghunatha was held by the Privy Council to be divested by the adoption made to the previous holder of the zemindary,

1. (1885) I.L.R. 9 Mad. 64, 77, 78 (F.B.).

2. *Raghunatha Deo* v. *Brozo Kishoro*, (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).

Adikonda Deo, by his widow. The learned Judges then close the judgment with the following words:

"The existence of a valid power creates a potentiality of inheritance which may be likened to that of the son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified sharetaker, who may afterwards become qualified to demand possession or beget a qualified son. In our judgment it must be held that the estate vests subject to its being divested on the recovery of the disqualified or the birth of a qualified heir[1]."

If the judgment in *Krishna* v. *Sami* had accepted the dissociation of survivorship from partition, in the manner of *Amrithammal's case*, what significance is to be attached to the argument based on the *Berhampore case*, and more especially to the categorical statement that the vesting of the estate, in the case actually in dispute, was subject to divestment on the birth of the plaintiffs. There would be no divestment whatever if the persons taking by survivorship, on the death of Sami Reddi, included Sami Reddi's disqualified son. It is because the Judges did not go as far as that, but accepted the view that the family property was solely vested in the defendant's branch, prior to the birth of the plaintiffs, that the argument about vesting and divesting had to be considered. This is absolutely vital, for the Judges in *Amrithammal's case* apparently understood the references to latent sharership and transmission of right, occurring in Sir Charles Turner's judgment, as authority for the view that the disqualified member, subject to a disability limited to partition, has, in his own person, solely by virtue of fitness to marry and independently of whether sons have been born or not, the status of a coparcener and the right to take by survivorship which is annexed to that status. Whether this view of the law is supported by the Saraswathi Vilasa, will presently be considered; but the authority of *Krishna* v. *Sami*, so far as it is material, appears to be against this view rather than in favour of it. It must of course be admitted that seeds of confusion were sown in the pictorial phraseology of Sir Charles Turner, and the sprouting of those seeds is to be seen now in *Amrithammal's case*.

The Saraswathi Vilasa, which has been brought into special prominence in connexion with the status of persons affected by disqualification, is numbered among the authoritative subsidiary commentaries of the Mitakshara Law. It does not figure in Colebrooke's first catalogue of Hindu Law Commentaries, but was introduced to fame by Mr. Ellis of the Madras Civil Service, and was eventually included among the treatises of the southern branch of the Mitakshara. It must be noted, however, that the propositions enunciated in these subsidiary commentaries have not all been accepted. It would be impossible to do so, in fact, for they differ among themselves in several respects. So far as the Saraswathi Vilasa is concerned, considerable difficulty was felt by the Judges in the *Jaggumpet case*[2] in applying the somewhat abstruse doctrine propounded in this commentary, on the authority of the great Lakshmidhara, regarding the inclusion of the heritage of the daughter's son in the category of *apratibandha daya*. The Judges

1. (1885) I L.R. 9 Mad. 64, 79 (F.B.).

2. *Chelikani Venkataramanayamma* v. *Appa Rao*, (1897) 7 M.L.J. 143: I.L.R. 20 Mad. 207, 218, 219.

held that it was impossible to reconcile this doctrine with the theory of *apratibandha daya* as formulated by Vijnaneswara. Caution is therefore needed, clearly, in the application of rules laid down in the Saraswathi Vilasa where they appear to depart from the law laid down in the Mitakshara. What is the position of the Saraswathi Vilasa in the context of the present discussion?

The relevant passage of the commentary is an exposition of the text of Manu regarding those who are disqualified for partition. It runs as follows:

मनुरपि दायानर्हांनाह

अनंशौ क्लीबपतितौ जात्यन्धबधिरौ तथा ।

उन्मत्तजडमूकाश्च ये च केचिन्निरिन्द्रियाः ॥

अस्यार्थः—अनंशौ क्लीबपतिताविति द्वित्वोक्तया दायार्हभ्रातृभिः रिक्थग्राहैर्वा योषिद्ग्राहैर्वा पोष्यौ ; जात्यन्धबधिराविति द्वित्वोक्तया तयोरंशोऽस्त्येव ; किंत्वंशयुक्तावपि पोष्यौ विवाहसंस्कारसद्भावात् । तथा शब्दप्रयोगेण पङ्ग्वादयः विवाहसंस्कारार्हाश्चेदंशहराः पोष्याश्चेति रहस्यम् । उन्मत्त जडमूकाश्चेति समुच्चयोक्तया तेऽपि भर्तव्या एव नांशहराः । विवाहार्हा न चेदिति शेषः ॥[2]

Manu also specifies those who are disqualified for daya.

The (*kliba*) hermaphrodite and the (*patita*) degraded are disqualified for sharing; so also those born blind or deaf; also the lunatic, the idiot and the dumb and also those devoid of an organ of sense.

The meaning of this text is as follows; from the dual proposition that the *kliba* and the *patita*, are excluded from share, it is to be understood that these are to be maintained by the brothers entitled to share, or in cases of inheritance, those who take the wealth or those who take the women. From the dual proposition regarding the congenitally blind and deaf, it is to be understood that a share certainly belongs to them; but though they are entitled to a share they are to be maintained on account of the possibility of marriage. From the use of the word *tatha* (in that manner) the hidden meaning is that the lame and others, if fit for the sacrament of marriage are sharetakers and entitled to maintenance. From the plural proposition regarding the lunatic, the idiot and the dumb, it is meant that they also are entitled to maintenance but do not take shares. In this statement denying share, the proviso, if they are not fit to marry, is to be understood.

It will be noticed that there is an affirmation of the status of sharership here, seemingly, in the case of various categories of disqualification, provided the person afflicted is fit to marry. The proposition is first enunciated with reference to congenital blindness and deafness. In the next placitum it is reiterated with reference to lameness and other categories of disability; lower down, the same thing is said with reference to the lunatic, the idiot and the dumb. Explicit reference is made to congenital disability only in the case of blindness and deafness, but the failure to refer expressly to congenital disability in other cases is probably not material, for in at least one of these other cases, the *jada* or idiot, the affliction must necessarily be congenital. We get, therefore, an apparently novel doctrine, propounding the paradoxical view

1. *Saraswathi Vilasa*, Mysore Edition p. 364; Foulkes's Edition, placita 148, 149.

that those who are declared *anamsa*, devoid of share, are nevertheless, *amsahara*, sharetakers, provided they are fit to marry. What is the explanation of this?

Does the Saraswathi Vilasa affirm full coparcenership, carrying with it the right to demand partition, in the case of every male member of the family who is fit to marry? In other words has this commentator shifted the basis of disqualification from physical or mental affliction to the capacity to marry and beget children? If the Saraswathi Vilasa goes as far as this, then the law of the Saraswathi Vilasa is certainly not the Hindu Law of the British Courts, for it has been conceded consistently in decided cases including *Amrithammal's case*, that those who are declared *anamsa* by the lawgivers are excluded from the right to partition irrespective of whether they are or not fit to marry and beget children. There is really no reason, however, for supposing that the Saraswathi Vilasa differs from the other law books in regard to this matter.

In a placitum lower down than the passage quoted above, commenting on the texts of Yajnavalkya, Vishnu and Devala, which say that the qualified son is entitled to a share, notwithstanding his being the son of a disqualified father, the Saraswathi Vilasa says:

निरम्शकपुत्राणामम्शग्रहणविरोधिव्याध्याद्यभावे पैतामहधनप्राप्तिः[1] ।

The sons of the *niramsakas* in the absence of disease, etc., excluding them from a share, are entitled to their rights in the grandfather's (ancestral) property.

If the existence of a qualified son is sufficient to annul the disqualification of the father, the phrase, *niramsakaputra*, son of the shareless man, must obviously be a contradiction in terms. Clearly, therefore, the *niramsaka* father is still a *niramsaka*, according to the Saraswathi Vilasa, even though he has a son who is *amsahara*, qualified to share in the family property. This is important, for it throws valuable light on the paradox that an *anamsa* is an *amsahara* if he is *vivaharha*, fit to marry, which occurs in the passage on which great stress has been laid in *Amrithammal's case*.

The passage in dispute is a comment on the text of Manu[2] regarding exclusion from inheritance and partition. The text says that those who are congenitally blind and deaf, *jatyandha badhirau*, are excluded from partition. The comment of the Saraswathi Vilasa on this is *prima facie* an amazing contradiction of what Manu says: तयोंरशोऽस्त्येव, to them a share certainly belongs, says the commentator. Somayya, J., lays great stress on this, but the learned Judge, who is a keen Sanskritist, has unfortunately failed to note the significance of the words that immediately follow.

But even though entitled to a share, they are to be maintained, owing to the possibility of marriage.

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1. *Saraswathi Vilasa*, Mysore Edition, p. 365; Foulkes's Edition, placitum 158.

2. Manu Smriti IX, 201.

This is an extraordinary way of affirming the afflicted man's coparcenership. Is not every coparcener entitled to maintenance as a matter of course? Why then does the commentator say किन्तु (*but*), and why अपि (*even though*), entitled to a share? These are words that are commonly used to unite propositions which do not quite harmonise with each other. But maintenance is one of the ordinary incidents of sharership. What is the explanation of this mysterious enunciation of the law? The answer is, clearly, that the sharership affirmed by the commentator is figurative, not actual, a status which is vicarious and potential, not personal and present. The stress on the proposition regarding maintenance is negative, not positive. The idea is, not, he is entitled to maintenance, but, he is entitled to maintenance only, no more. In order to understand the position correctly it is necessary to look at the text of Manu which is the basis of the commentary, in the context in which the lawgiver has placed it. Following this text immediately there are two other texts, one affirming the right to maintenance, the other affirming the rights of the disqualified man's issue.

सर्वेषामपि तु न्याय्यं दातुं शक्त्या मनीषिणा ।
ग्रासाच्छादनमत्यन्तं पतितो ह्यददद्भवेत् ॥
यद्यर्थिता तु दारैः स्यात् क्लीबादीनां कथंचन ।
तेषामुत्पन्नतन्तूनामपत्यं दायमर्हति ॥[1]

For all of them it is proper that food and raiment should be given according to capacity as long as they live. The taker of the property, who does not give them food and raiment, shall be *patita*. If somehow or other the *kliba* and others should desire to marry, the children of those who get progeny shall be qualified to take *daya*.

The Saraswathi Vilasa does not quote these texts. It seems probable, though the suggestion rests on mere speculation, that the commentator was reluctant to quote a text of Manu which in terms speaks of a *kliba* perpetuating lineage by marriage. Lower down, in commenting on Yajnavalkya's text regarding the rights of the disqualified man's son, the commentator brushes aside the reference to the kshetraja son, who is put by Yajnavalkya on the same footing as the aurasa son.

तद्द्वापरादियुगविषयमिति मन्तव्यम् । कलौ क्षेत्रजपुत्रनिषेधात् ।[2]

That should be understood to refer to the Dwapara and other Yugas, for in the Kali age the kshetraja son is forbidden.

It is not unnatural, in view of this attitude, that the author was reluctant to quote a text of Manu which speaks of the *kliba* marrying and producing vicariously sons who will be free from the disqualification attaching to the father. But in so far as the principle was applicable to aurasa sons the law had to be stated, and the curious method was adopted by the commentator of reading that proposition into the quoted text which affirms the father's disability, instead of quoting the succeeding texts of Manu himself.

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1. Manu, IX, 202-203.

2. *Saraswathi Vilasa*, Mysore Edition, page 365; Foulkes's Edition, placitum 157.

The rule regarding food and raiment, and the rule regarding the status of the issue, are both enunciated in the Saraswathi Vilasa as if they are qualifications which have to be read into Manu's text by external interpretation, and not propositions explicitly enunciated by the lawgiver himself. If this is kept in mind the meaning of the mysterious passage of the Saraswathi Vilasa presents no difficulty. The text of Manu is analysed, the categories of disqualification represented by each *samasa* being taken separately. First come the *kliba* and *patita*, in whose case the right is to maintenance only. Then come the congenitally blind and deaf, in whose case there is a seemingly emphatic affirmation of sharership, followed by the statement, *though* there is a right to share they are entitled to maintenance. The concession of sharership is stated to depend upon the possibility of marriage. The relegating of the ablative *vivahasamskara sadbhavat,* to the end of the sentence is infelicitous, for it makes the sentence read as if the right to maintenance is founded on the capacity to marry. Clearly, however, it was meant to apply to the share, not to the maintenance[1]. But in what sense is capacity to marry significant in this context? Does the Saraswathi Vilasa affirm a real right of coparcenership? Obviously not, for then the किन्तु (*but*), and अपि (*although*), would have no meaning whatever. The commentator is merely referring to the figurative and vicarious coparcenership represented by the status of the sons that may be born to the disqualified man. The किन्तु is a caveat, a hurried attempt to correct a possible misapprehension. It is as if the commentator has said, the disqualified man will take a share in the person of his son, and then had gone on to say, let there be no mistake, personally in his own right the unfortunate man is entitled to no more than maintenance.

Seshagiri Aiyar, J., in *Muthusami Gurukkals's case*[2], has thrown out a suggestion that the share of the disqualified man was to be managed for him according to the Saraswathi Vilasa. This presupposes a right to share in the event of a partition. But it is quite clear that the Saraswathi Vilasa did not contemplate the setting apart of a share for the disqualified member of the family. The word पोष्यौ (*are to be maintained*), refers to the *grasachhadana* of the Manusmriti, the food and raiment to which alone the *anamsa* was entitled. It does not refer to the protection and management of any share, for no right to share is recognised either by the lawgiver or the commentators.

On the view suggested above there is no justification for reading the Saraswathi Vilasa as if it laid down any novel rule unknown to the other law books. The commentator is reading into one text of Manu the propositions that Manu himself has distributed between three texts. There is really no *rahasya* or secret doctrine, for the proposition that an *anamsa* is *amsahara,* if fit to

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1. I had intended to examine all the available manuscripts of the Saraswathi Vilasa to see if there was any doubt regarding the correct reading of the disputed passage. But I could not find the necessary time and leisure. Foulkes says that he examined a sufficient number of manuscripts to establish a reliable text. His claim is probably well founded.—*K. V. V.*

2. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464, 473.

marry, is merely a combination of the actual present with the potential future. The author of the Saraswathi Vilasa was a king who loved to pose as a lawyer, and there is nothing surprising in his desire to present the old law in a new guise, clothing a platitude with the appearance of a paradox.

Attention must be drawn, before proceeding further, to the difference made by the Saraswathi Vilasa between the congenitally blind and deaf, on the one hand, and the lunatic, idiot and the dumb, on the other, regarding fitness to marry. In the former case, the commentator took it for granted that there is capacity to marry. In the case of the lunatic and others, on the other hand, the position is stated conditionally, *if* there is fitness to marry. This clearly implies that the capacity for marriage is not as indisputable in the second group of cases as in the first. This is made clear later on, in dealing with the text of Apastamba.

जीवन् पुत्रेभ्यो दायं विभजेत् समं क्लीबंमुन्मत्तं पतितं च परिहाप्य.

The father shall during his lifetime divide the wealth among his sons equally, excluding the *kliba*, the *unmatta* and the *patita*.

The commentator states that the exclusions here refer to sons who are unfitted for sharership and goes on to add

च शब्दो विवाहानर्हाणामुपलक्षकः[1] ।

The word च, (*and*) must be understood to comprise others who are not fit for marriage.

An *unmatta* or lunatic, therefore, may or may not be fit for marriage. It would apparently be, as the Privy Council said in *Mouji Lal* v. *Chandrabati*[2] a question of degree. The point is of special importance in view of the opinion expressed by the learned Chief Justice in *Amrithammal's case*, that a congenital idiot is competent to marry under Hindu Law. A marriage had taken place in the litigation before the Judges, and the case was clearly governed by the very strong presumption of validity that applies to a marriage which is shown to have taken place. Indeed, the Judges might very well have worked backwards from this presumption and held that Chellakrishna could not have been a congenital idiot. The question is not so wholly one of fact that the Judges in Second Appeal could not have done this. But even if that were not possible, there was no need to lay down, positively and universally, that idiocy is no bar to marriage under Hindu Law. For part of the confusion prevailing on this matter, a learned Hindu Judge, Muthuswami Aiyar, J., must bear the responsibility. It was he in *Venkatacharyulu* v. *Rangacharyulu*[3] that propounded the dictum, that insanity is no bar to marriage under Hindu Law. In relation to the bride, whom Hindu Law regards as the object of a gift, the proposition is unexceptionable. In relation to the bridegroom, unless the insanity referred to is merely defective or disordered intelligence, the proposition is utterly opposed to the basic ideas of the Dharmasastra.

1. *Saraswati Vilasa*, Mysore Edition, p. 365; Foulkes's Edition, placitum 155.
2. (1911) 21 M.L.J. 933: L.R. 38 I.A. 122: I.L.R. 38 Cal. 700, 706 (P.C.).
3. (1890) 1 M.L.J. 85: I.L.R. 14 Mad. 316, 318.

The bridegroom is the recipient of a gift, the bride being the object of the donation, and he has further to take an intelligent part in religious ceremonies. The law on this matter appears to be, judging from decided cases, a pitfall for English Judges. They are familiar with the proposition that marriage under Hindu Law is not a contract, which is a half truth, for though it may not be a contract in the sense of an English marriage, a contract between husband and wife, it is nonetheless a bilateral transaction to which the bridegroom is a party, being a gift of the bride to him by the girl's father or guardian. Many Judges, unfortunately, have taken the proposition that marriage is a sacrament and not a contract under Hindu Law, to imply that nothing in the world is too irrational for a Hindu marriage. The notion that marriage is a sacrament under Hindu Law has unhappily become in the hands of well meaning but ill-informed English Judges, the subject of a great deal of caricatural distortion. It is remarkable that there should be two judgments delivered this year[1] supporting the generalization that insanity of a male presents no impediment to lawful marriage. The actual decisions were probably right, but the general enunciation of the law, divorced from the concrete setting of facts, may well produce strange results in the subordinate Courts.

Going back to *Amrithammal's case* and reading it in the light of what has been said about *Krishna* v. *Sami* and the Saraswathi Vilasa, what were the relative rights of Veerakumara and his idiot son Chellakrishna? When Veerakumara died the sons of Chellakrishna were not in existence. Admittedly they were born later. The bequest of Veerakumara must be judged by the state of affairs at the time of his death. If it was valid then, it could not be invalidated by subsequent events. That is clear from the decision of the Privy Council in *Krishnamurti* v. *Krishnamurti*[2]. The question therefore comes to this, was Chellakrishna in his own right a coparcener with his father Veerakumara? The Judges answered this question in the affirmative relying on *Krishna* v. *Sami* and the Saraswathi Vilasa. The learned Chief Justice says:

"The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognise that his son, should one be born to him, has the right to share in the family estate is itself an indication that he is a member of the coparcenary" (page 299).

This, of course, is merely the direct application of the retroactive reasoning suggested in *Krishna* v. *Sami*, which works backwards from the qualified son to the disqualified father and seeks a justification for the father's coparcenership in the reflected lustre cast on him by the qualified son. The argument assumes that the coparcenership of the son which is admitted must be a status derived from the father. Is that assumption correct?

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1. *Amrithammal* v. *Vallimayil Ammal*, (1942) 2 M.L.J. 292; *Bhagwati Saran* v. *Parmeshwari*, (1942) A.L.J. 197.

2. (1927) 53 M.L.J. 57: L.R. 54 I.A. 248: I.L.R. 50 Mad. 508, 525 (P.C.).

The Mitakshara introduces the text of Yajnavalkya which says that the qualified son is sharer even though he is the son of a disqualified father, with the following words:

क्लीबादीनामनंशित्वात्तत्पुत्राणामप्यनंशित्वे प्राप्ते इदमाह
औरसाः क्षेत्रजास्त्वेषां निर्दोषा भागहारिणः[1] ।

"From the exclusion from shares of the *kliba* and others, the exclusion of their sons also would follow, therefore the lawgiver states :

Their sons, aurasa and kshetraja, if personally free from defect, will take shares."

This shows that it is a mistake to speak of the disqualified father being the medium through which the qualified son derives his coparcenership. The Smriti Chandrika explicitly says[2] that the coparcenership conceded to the son is an *apavada*, the annulment by express textual authority of the disqualification which would otherwise have affected the son also. The idea of transmission, originating in *Krishna* v. *Sami*, is in fact a figure of speech which proves either too much or too little. If the recognition of a right of the son implies the recognition of a similar right in the father, how does it happen that the son has a right to partition, whereas the father has not? On the other hand, if it is admitted that the status of the father may be inferior to that of the son, what is the justification for supposing that the status of coparcenership must be conceded to the father because the son has admittedly the rights of a coparcener? That will be not merely inversion of logic but falsification of the law also. There are several cases known to the law where the child has a status which is denied to the parent. The sister's son is entitled to inherit under the Dayabhaga law, but the sister herself is excluded. What happens here to the idea of transmitting heritable blood? The principle applied to reversioners in *Bahadur Singh* v. *Mohar Singh*[3] and other cases, that the relationship of the son must necessarily be traced through his father, but his reversionership itself is in his own right and not through the father, is equally applicable to the coparcenership conceded to the qualified son of a disqualified father. The relationship to the grandfather and other members of the joint family must no doubt be traced through the father. But the status of coparcenership itself is inherent and not derivative. The theory of *Krishna* v. *Sami* that there is a coparcenership latent in the father which becomes manifest in the son is a metaphorical varnish which hides the fatal weakness of the legal position. The Judges were dealing with a case where qualified sons had been born. The father himself was of no consequence. Their description of the father as one whose coparcenership was latent, was an euphemism. This is clear from the analogy with which the judgment of Sir Charles Turner closes, between the *Berhampore case* and the actual facts of *Krishna* v. *Sami*. The potentiality of the future son's co-parcenership was the crucial idea in both cases. But the potential coparcenership of a future son is obviously not an

1. Mitakshara, Setlur's Edition, pp. 838, 839.
2. *Smriti Chandrika*, Mysore Edition, Vyavahara Kanda, p. 633.
3. (1901) 12 M.L.J. 56: L.R. 29 I.A. 1: I.L.R. 24 All. 94 (P.C.).

adequate basis for a present claim to survivorship. The disqualified father is *dayanarha*, incompetent to acquire *swamya* by virtue of his relationship, and excluded by his incapacity for *daya* from the right to take by survivorship. If the disqualified man can introduce a coparcener into the family by begetting a son, it can be said with equal force that a widow can introduce a new coparcener into the family by the exercise of her power of adoption. There is as much or as little justification for a personal claim to survivorship in the one case as in the other.

Would it be improper to suggest that the decision in *Amrithammal's case*[1] should be reconsidered? In so far as it related to the question of bequest its authority as a binding precedent is doubtful, because it proceeded on an admission which should never have been made. So far as it related to the question of survivorship in the case of a person affected by congenital disqualification, apart from the merits of the controversy, it is admittedly in conflict with the previous Full Bench decision in *Pudiava Nadan's case*[2]. The Judges dissented from this Full Bench decision on the ground that it was inconsistent with the more weighty pronouncement in *Krishna* v. *Sami*[3]. But *Krishna* v. *Sami* does not deal directly with a claim to survivorship by a person affected by congenital disability. If the dicta of Sir Charles Turner seemed to point in that direction, *Amrithammal's case* might have been referred to a Full Bench of five Judges. The present position is clearly unsatisfactory. Is it inconceivable that a future Full Bench may accord to the judgment in *Amrithammal's case* the treatment that the Judges in this case accorded to *Pudiava Nadan* v. *Pavanasa Nadan*? Argument must doubtless stop somewhere, but the enduring stability of the law will be promoted by the timely correction of a mistake much better than by the technical insistence on the perpetuation of error. Is not the finality attaching to a Full Bench judgment itself a reason for placing it on a foundation of unchallengeable authority?

SUMMARY OF ENGLISH CASES.

DUNCAN *v.* CAMMEL LAIRD & CO., LTD., (1942) 1 All.E. R. 587 (H.L.).

Practice—Discovery—Objection by Crown to production of documents in civil action on the ground that it would be contrary to public interest to produce them—Grounds of.

Where the Crown claims privilege against production of documents the principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interests require that they should be withheld. This test may be found to be satisfied either (*a*) by having regard to the contents of the particular document or (*b*) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

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1. (1942) 2 M.L.J. 292 (F.B.).
2. (1922) 43 M.L.J. 596: I.L.R. 45 M. 949 (F.B.).
3. (1885) I.L.R. 9 Mad. 64 (F.B.).

As to the proper form of taking the objection that the production of the document will be contrary to public interest, the essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the document and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents—*e.g.*, departmental minutes—to which they belong. Where it is not convenient or practicable for the political minister to act (*e.g.*, he may be out of reach, or ill, or the department may be one where the effective head is a permanent official) it would be reasonable for the objection to be taken by the permanent head. If the question arises before trial the objection would ordinarily be taken by affidavit. If it arises on *subpoena* at the hearing, the minister's objection can be conveyed to the Court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. If the Court is not satisfied by this method, it can request the minister's personal attendance.

When such objection has been validly taken the judge has to treat it as conclusive and decide accordingly.

The mere fact that the documents are "state documents" or "official" or are marked "confidential" would not afford to the minister adequate justification for objecting to production. It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witness or otherwise of officials who have public duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the document produced. The minister ought not to take the responsibility of withholding production except in cases where the public interests would otherwise be damnified—*e.g.*, where it would injure national defence, or good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

(1941) 1 All.E.R. 437, affirmed.

Middlesex County Council *v.* Kiverstein, (1942) 1 All.E.R. 596 (C.A.).

Public Health Act, 1936, S. 184 (1)—Right of hospital authorities to recover expenses of maintenance of a patient from his estate on his death.

It is provided by the Public Health Act, 1936, S. 184 (1) . . "that a county council . . shall, recover from a patient, or from any person legally liable to maintain him, or from the patient's estate, if he has died, any expenses incurred . . . . in providing for his maintenance . . . . , not being expenses recoverable from any other source . . . . . . ".

Where on the death of a woman patient the hospital authorities claimed the expenses from the patient's estate and it was contended

that the claim was excluded by the words "not being expenses recoverable from any other source" since the expenses could be recovered in contract against her husband,

Held, the words of limitation refer to the right to recover the expenses under the Road Traffic Act in which hospital expenses can be recovered against a defendant to a claim for an accident upon the road. Accordingly the claim against the estate cannot be resisted.

GUARDIAN TRUST AND EXECUTORS CO. OF NEW ZEALAND LTD. *v.* PUBLIC TRUSTEE OF NEW ZEALAND, (1942) 1 All.E.R. 598 (P.C.).

Will—Executors—Obtaining order of Court and paying certain legacies after notice of dispute as to validity of will—Liability of executors.

After obtaining an order of Court, the executors under a will, with notice of a dispute as to the validity of the will—published notices requiring "all creditors and other persons" having claims against the estate of the deceased to send in such claims to the executors "together with written particulars thereof" on or before January, 31, 1936. The notices stated that, after such date the executors proposed to distribute the assets among the parties entitled thereto having regard to the claims of which they should have then received notice. Solicitors acting for some of the next of kin wrote on December 18, 1935, to the executors of steps being under consideration to obtain a revocation of the probate on the ground of lack of testamentary capacity on the part of the testatrix. A formal acknowledgment was sent to the solicitors but otherwise no notice was taken of it by the executors who on various dates between February 14 and 20, 1936 made payments of various legacies. On February 20, the solicitors again wrote that they had received instructions to take proceedings for revocation of the probate granted to the executors and in reply were informed that "distribution of the estate had been made." As a result of proceedings taken by the next of kin the probate was ordered to be recalled in December, 1936. An action was instituted for the benefit of the next of kin on December 22, 1937, by the person who had obtained letters of administration against the executors for recovery of £8,450 and interest distributed by them. The executors at all material times believed that the testatrix had testamentary capacity and had acted throughout with perfect honesty.

Held, since the payments to the legatees were made with knowledge and notice of the claim of the next of kin and there was no obligation to pay the legacies by reason of the grant of probate, the executors were liable for the claim.

GIFFORD *v.* WHITTAKER, (1942) 1 All.E.R. 604 (K.B.D.) : (1942) 1 K.B. 501.

Motor Vehicles Regulations, 1937, Reg. 67 (2), 94—"Using the vehicle"—Meaning—Loading done by hirers—Driver—If liable as "using" the vehicle.

The driver of a motor lorry was charged with contravening Reg. 67 (2) of the Motor Vehicles Regulations (1937) in that he had failed to have the load carried by the vehicle he was using so secured that danger was not likely to be caused to any person on the road by

reason of any part of the load falling from the vehicle. The driver was driving the vehicle under instructions of the foreman of a brewery company to whom the lorry was on hire. The employees of the brewery company alone had loaded the vehicle and it was contended by the respondent that it was the foreman of the brewery and not the respondent that was in charge of the vehicle and therefore "using the vehicle".

Held, that the person using the vehicle was the driver and he was therefore liable.

McMillan *v.* Guest, (1942) 1 All.E.R. 606 (H.L.).

Income-tax Act (1922), Sch. E., R. 6—Director of private company resident abroad—If public officer —Liability to assessment.

A director of a company incorporated under the Companies Act, 1929 is the holder of a public office and that office is located where the company is. Even if the company was a private company the directorship was nonetheless a public office within the United Kingdom. (1940) 4 All.E.R. 452 (C.A.), affirmed.

Fattorini *v.* Inland Revenue Commissioners, (1942) 1 All.E.R. 619 (H.L.).

Income-tax Act (1922), S.21(1)—Only income of company not distributed as dividends—Claim by Crown that it was unreasonable and that income should be deemed to be distributed among members for purposes of income-tax—Onus of proof of unreasonableness.

An investment company, acquired the shares in three commercial companies, chiefly with money borrowed from a bank, on the terms that it should pay over to the bank all the dividends received in respect of all its shares until the indebtedness to the bank for capital and interest was completely satisfied. The certificates of the purchased shares were all deposited with the bank as security along with blank transfers and powers of attorney and a letter of deposit giving the bank an immediate power of sale. The company had no income apart from the dividends on the shares which it had acquired. These dividends, in pursuance of the agreement with the bank, were all paid over to the bank, and the company paid no dividends to its shareholders. The Inland Revenue authorities contended that the company had failed to distribute as dividends "a reasonable part of its actual income" and that the income should be deemed to be the income of its members among whom it shall be apportioned for purposes of income-tax. The contract with the bank was however admitted to be reasonable. In the circumstances,

Held, it was for the Crown to show that it would have been reasonable for the company, notwithstanding its contract with the bank, to raise money by borrowing or otherwise in order to pay a dividend and the company could in fact have raised the necessary money. In the absence of any such evidence the contentions on behalf of the Crown must fail.

When a matter reaches the stage of a stated case, the question is not properly one of onus. It is simply a question of whether the

facts found and stated afford evidence on which the board could properly arrive at their conclusion. (1940) 3 All.E.R. 657, reversed.

FATTORINI *v.* INLAND REVENUE COMMISSIONERS, (1942) 1 All.E.R. 619 (H.L.).

Practice—Statement of case to tribunal—Desirability of separating finding of fact and inferences of facts and law based on them.

It would assist a tribunal, to which a case is referred if the facts found were carefully separated from the inferences of fact and law based upon them and if those inferences themselves were clearly distinguished. In setting out a case it is not legitimate, after stating the facts, to reach a certain conclusion by saying that such and such a thing is found as a fact. Such a final conclusion is not a "fact" but an inference from facts previously set out and therefore that conclusion is not binding upon the tribunal to which the case is referred unless it appears from the previous findings that there are facts which support it. (Per Lord Porter).

OSBORNE *v.* STEEL BARREL CO. LTD., (1942) 1 All.E.R. 634 (C.A.).

Income-tax—Company—Acquisition of stock by issue of fully paid shares—Computation of value of stock for income-tax.

Where the consideration paid by a company for its stock was some cash and some fully paid shares of the company, it was contended for the Crown that the issue of the shares did not cost the company anything and the only thing that the company paid was the cash and the opening stock must be valued accordingly.

Held, that the price paid for the stock must be taken as a sum of cash equal to the par value of the shares. It would have been illegal for the company to have issued shares at a discount.

BEAK *v.* ROBSON, (1942) 1 All.E.R. 639 (C.A.).

Income-tax—Sch. E., R. 1—Director of company—Payment to him of lump sum as consideration for restrictive covenant by him—Assessability.

The respondent entered into an agreement with a company in whose employment he had been for some time, whereby he was to be employed for a term of five years as director and manager, at a salary there stated. The agreement contained clauses under which, in the event of the respondent determining the agreement by notice, as he was entitled under one of its clauses to do, or committing a breach of it which led to a determination, he should not for a stated period, without the consent of the company, be engaged or interested in the business of a coal exporter within a radius of fifty miles. In consideration of this covenant a sum of £ 7,000 was paid. The Crown claimed that it was remuneration from his office of director and manager and taxable accordingly under Sch. E.

Held, that the amount was a separate consideration in respect of the obligation under the covenant and cannot properly be assessed as remuneration from the service.

Re JONES' WILL TRUSTS, JONES *v.* JONES, (1942) 1 All.E.R. 642 (Ch.D.).

Wills—Trust—Gift by reference to existing ascertainable document or to a document which may in the future be substituted therefor—Validity—Tests.

A gift in a testamentary document, by reference to a then existing and identifiable document, may be valid. The later document is incorporated in the former, and may, though not necessarily, be admitted to probate. It is equally clear that a gift in a testamentary document may be made by reference to other documents in such terms as to exclude parol testimony as where the reference is to papers not yet written, or where the description is so vague that it is incapable of being applied to any document in particular. Such a gift is clearly bad. Where in the testamentary document there is a gift by reference to an existing ascertainable document or to a document which may in the future be substituted therefor, the whole gift must be treated as invalid, upon the ground that the testator's testamentary intention can only be ascertained by evidence *de hors* the will itself both in regard to documents existing at the time of the will and to those coming into existence thereafter and as such evidence cannot be admitted about the latter, it ought not to be admitted about the former as otherwise the testator's intention cannot be ascertained as a whole. The gift must fail for uncertainty.

It is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil.

Re LESTER : LESTER *v.* LESTER, (1942) 1 All.E.R. 646 (Ch.D.).

Wills—Gift subject to payment of annuities—Liability of legatee—Extent.

Where a testator bequeathed certain shares, "subject to the payment of an annuity" to another person, it was admitted that the legatee accepting the legacy is under a personal obligation but it was claimed that a charge was created on the shares.

Held, it must be a question of construction in each case whether an obligation or a charge or both is or are created. The words in the instant case cannot be construed as creating both a personal obligation and a charge. Accordingly there is only a personal obligation.

EARL FITZ WILLIAMS COLLIERIES CO. *v.* PHILLIPS, (1942) 1 All. E.R. 648 (C.A.).

Income-tax—Payment for right to let down surface under mining lease—If "rent" or damages.

The amount agreed to be paid by a colliery company for the right to let down the surface is "rent" as the right was an easement within the Finance Act (1934), S. 21 (4) and not a compensation for damage. (1941) 3 All.E.R. 296, affirmed.

SKELTON AND OTHERS *v.* YOUNGHOUSE AND ANOTHER, (1942) 1 All. E.R. 650 (H.L.).

Wills—Option to purchase given to a named person—If can be exercised by executors of donee.

In the absence of any contrary intention shown in the will an option to purchase some shares in a private company given by a will to a named person is personal to him and does not pass to his executors or constitute a transmissible interest. (1940) 4 All.E.R. 122, affirmed.

DAVIES AND ANOTHER *v.* POWELL DUFFERIN ASSOCIATED COLLIERIES LTD., (1942) 1 All.E.R. 657 (H.L.).

Tort—Negligence—Law Reform Act (1934) and Fatal Accidents Act (1866)—Overlapping of damages—Effect on assessment of damages.

The damages due under the Law Reform Act and under the Fatal Accidents Acts are both in respect of the same negligence, and it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to the dependant under the Fatal Accidents Act. [(1941) 1 All.E.R. 278 (C.A.) affirmed.]

BORMAN AND OTHERS *v.* LONDON & NORTH EASTERN RAILWAY CO., (1942) 1 All.E.R. 671 (C.A.).

Railways Act (1921), Sch. III—Amalgamation of Railway Companies —Dismissal of employees on account of retrenchment—If dismissal on account of amalgamation.

Schedule III of the Railways Act provided *inter alia* for compensation for existing employees who suffered loss on account of amalgamation of Railway Companies. Certain employees were dismissed after amalgamation of companies as a measure of retrenchment which would have been done even if there had been no amalgamation. On a construction of the relevant provisions, *held,* that the employees cannot recover compensation thereunder as their dismissal was not an event arising out of the amalgamation.

(1942) 1 All.E.R. 442, affirmed.

EGHAM ELECTRIC CO. *v.* EGHAM URBAN DISTRICT COUNCIL, (1942) 1 All.E.R. 674 (K.B.D.).

Contract—Agreement to supply electricity for public lighting at a fixed sum per quarter—Blackout regulations preventing display of lights and reducing consumption—If entitles consumer to abatement.

Under a contract the plaintiffs were to provide certain things, maintain, repair and paint, streetlights, etc., as well as supply electricity. The defendants were to pay a lump sum each quarter for all such services. The lighting restrictions prohibited the display of lighting on the streets except in certain limited ways. In the circumstances, as there was no provision in the agreement for abatement on such a ground though abatement in certain other events had been provided for, *held,* that the defendants were not entitled to claim any abatement.

HENRIKSEN *v.* GRAFTON HOTEL LTD., (1942) 1 All.E.R. 678 (C.A.).

Income-tax—Profits—Monopoly value of licensed premises—If can be deducted.

The monopoly value of licensed premises is in its nature and quality a capital payment and cannot therefore be deducted from the assessable profits of that business.

(1942) 1 All.E.R. 18, affirmed.

YORKSHIRE DALE STEAMSHIP CO. LTD. *v.* MINISTER OF WAR TRANSPORT: (THE COXWOLD), (1942) 2 All.E.R. 6 (H.L.).

Insurance—Marine policy—Ship requisitioned and sailing in convoy—Alteration of course to avoid enemy action—Stranding by tidal set—Loss if due to war risk or marine risk.

A motor ship, which was requisitioned, stranded while sailing in convoy and it was found that the stranding was not due to the negligence of those on board and that subsequently the ship was taken some miles out of her course by a tidal set. In a claim by the owners for indemnity from the Ministry of War Transport,

Held: (reversing the decision of the Court of Appeal in (1941) 3 All.E.R. 214 and restoring the decision in (1941) 2 All.E.R. 776) the totality of the circumstances causing the loss must be taken into consideration and as there was evidence to support the finding of the arbitrator that the loss was the consequence of a warlike operation it cannot be upset.

WALES *v.* TILLEY, (1942) 2 All.E.R. 22 (C.A.).

Income-tax Act (1918), Sch. E—Commutation of salary and pensions—Assessability of amount received to income-tax.

A company agreed to pay its managing director £ 6,000 per annum and a pension of £ 4000 per annum for ten years after he ceased to be managing director. Subsequently he released the company from the obligation to pay the pension and agreed to serve for £ 2,000 per annum and in consideration for these stipulation the company agreed to pay him £ 40,000, in two equal instalments. It was contended that this amount was a capital receipt and not assessable as profit.

Held: (Mackinnon, L.J., dissenting) by Lord Greene M.R. and Goddard, L.J.: The payment was a profit arising from the office and was therefore assessable under Sch. E of the Income-tax Act.

(1942) 1 A.ll.E.R. 455, affirmed.

LANE *v.* MINISTER OF WAR TRANSPORT, (1942) 2 All.E.R. 28 (C.A.).

Requisitioning—Lorry hired by Crown by the day—Requisition notice—Service—Terminates agreement and entitles Crown to keep the lorry.

Where there is an agreement for the hire of a chattel like a lorry by the Crown under which the Crown was to pay £ 1 per day the hiring being terminable forthwith, the service of a requisition notice by the Crown will terminate the contract of hire and will entitle the Crown to keep the lorry there being no legal objection to the requisition notice. [(1942) 1 All.E.R. 526 and (1942) 1 Ch. 280 affirmed.]

AMAND, *In re* (No. 2), (1942) 1 K.B. 445.

Constitutional Law—Acts of foreign sovereign—Validity—When open to question in English Courts.

A Netherlands subject resident in England was arrested as an absentee from the Netherlands Army. He questioned the validity of the conscription decree by the Netherlands Government then established in England. On the question of jurisdiction, *Held*, it is well settled that Courts cannot question the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction. But when the act, the validity of which is questioned is the act of a foreign government (Netherlands in the instant case) sojourning temporarily by reason of emergency in England and recognised as the legislative authority by the government of England, and the act affects a national of that state resident in England under the protection of the British government and its laws, the circumstances being exceptional, the court can go into the question of the validity of the act of such foreign sovereign, more especially as the Netherlands courts were not functioning.

JOTTINGS AND CUTTINGS.

Magna Carta.—On 15th June, the 726th anniversary of the signing of Magna Carta was celebrated by a notable B.B.C. broadcast showing how this charter has become an intrinsic part of the common law of England. In 1215, said the commentator, the barons and the clergy faced King John at Runnymede and forced him to grant rights to the free men of England. Although at that time not all the inhabitants of England were free, the effect of Magna Carta had since widened, not only to include the whole population of England but also all liberty-loving people throughout the world. The commentator said that probably the barons who united against the king were "building more wisely and more largely than they understood." This concern for liberty, manifest in Magna Carta, in the Bill of Rights, in the Reform Acts of the nineteenth century, and in the Parliament Act, 1911, ensured justice. Less than fifty years after the signing of Magna Carta the great lawyer Bracton explained it to the citizens of London. and it became part of the common law of England. In the American declaration of Independence the rights of life, liberty and property were those of free English citizens. The right to trial by peers was according to the common law of England. In an inspiring address at the conclusion of the programme, the Master of the Rolls, Lord Greene, said that in the Abbey at Tewkesbury there was the story of the barons at Runnymede on the grave of one of the barons. Though much of the wording had been erased by time, the story ended : " Let the king look to it." In framing the laws of England, said Lord Greene, we have turned to the spirit of Magna Carta. The State and the ministers of State were ruled by the law of the State, from which they could not depart, whereas dictatorship was responsible to no law. The law of the land protected the individual : dictatorship did not. No government could influence the decisions of the Judges in our courts, as dictators did. The law of England was made by Parliament elected by the people, and the supremacy of Parliament and the rule of law together produced

freedom. In 1939, said Lord Greene, Lord Lothian had presented a copy of Magna Carta to the World's Fair at New York, and had remarked that Magna Carta was the foundation of American liberty and our own. It was for this liberty that we were fighting together, and Lord Greene warned our enemies, "Let them look to it."—*S.J.*, *1942, p. 183.*

Mr. Justice Langton.—The news of the untimely death of Mr. Justice Langton last week came as a shock to those who knew him, whether as a judge or as a friend. There were many respects in which his life had become distinguished, and there was every reason why he should have looked forward to even greater distinction. He was born on 22nd April, 1881, and was educated at Beaumont and New College, Oxford. In 1905 he was called to the Bar and, having read in Admiralty and Commercial Chambers, he soon distinguished himself in that class of work. When war broke out in 1914 he took a commission in the Royal Garrison Artillery, and was later transferred to War Office Intelligence. In 1916 he became Director of Labour Department and Commissioner for Labour Disputes at the Ministry of Munitions, and in 1918-1919 he was Controller of the Demobilisation Department at the Ministry of Labour. In 1930 he was made a judge of the Probate, Divorce and Admiralty Division, and it is worthy of note that he was the only judge of the Roman Catholic persuasion ever to be a judge of the Divorce Court. It says much for his high sense of duty that he accepted the position only after taking high ecclesiastical advice. For a long time he was a member of the Comite Maritime International, and he also filled the offices of Vice-President of the Council of Legal Education and Chairman of the Board of Studies. He was a brilliant lawyer and a great judge in other fields besides that which he had made peculiarly his own. Many students of case law will remember his incisive judgment in the *Azkarai Mendi*, (1938) P. 263, on the subject of damages for the loss of expectation of life, a subject which he re-examined and elaborated in a profound and scholarly article on the law of compensation in this year's January issue of the *Law Quarterly Review*. The bench and the legal profession have suffered an irreparable loss.—*S.J.*, *1942, p. 237.*

BOOK REVIEW.

Banking Law and Practice in India, by M.L. Tannan, M. Com., Barrister-at-law, with a Foreword by the Right Hon'ble M. R. Jayakar, 4th edition, published by Butterworth and Co. (India), Ltd., Bombay (1942).

To have written a book to which the student can turn without bewilderment, which the lawyer can study with profit and the businessman can consult without doubt is high achievement indeed which Mr. Tannan the author has accomplished in the book under review. He has spiced the book with a historical and jurisprudential flavour which renders the work really attractive. The writer of a legal text-book has to steer clear of two difficulties. On the one hand he may include within its compass legal topics but remotely bearing on the one sought to be expounded, thereby laying himself open

to the charge of discursiveness. The searchlight which the author flashes on such a wide area tends to leave a blurred impression owing to lack of concentration on the narrow and chosen ground. On the other hand he may confine himself strictly to the thesis which he has chosen and meticulously refrain from touching allied or connected topics, subjecting himself thereby to a possible charge of incompleteness. Mr. Tannan has skilfully steered clear of both these possibilities and struck a happy mean. One or two shortcomings may however be noticed. One might naturally expect in a text-book of this kind a fuller reference to the implied authority of partners in banking partnerships to bind the firm and the liability of the banking firm for misappropriation by individual partners of moneys deposited with the firm, as illustrated by decisions like *Devaynes* v. *Noble*, (1816) 1 Merrivale 530. The law of vicarious liability as applied to banking concerns—for instance, as to how far a bank is responsible for the torts committed by its servants—might also have been usefully adverted to. The recent decision of the House of Lords in *United Australia, Ltd.* v. *Barclay's Bank, Ltd.*, 1941 A.C. 1, as to waiver of alternative causes of action in tort and contract in cases of misappropriation by banks has escaped notice. The vexed question of cheques paid in respect of gambling and other transactions might have been touched upon and the difference in this connection between void dealings which do not and illegal dealings which do taint collateral transactions and deprive *bona fide* transferees of their remedy might have been alluded to. These points do not in any way detract from the merit of the work which is considerable and its usefulness which is real. This is amply borne out by the rapid passage of the book through four editions within a comparatively short period. The case-law has been brought up-to-date and an index of cases and a general index are also given. It is with pleasure that we are able to endorse Mr. Jayakar's observation in his Foreword that the book "has occupied a coveted place as a standard work on Indian Banking Practice."

"THE TRANSFER OF PROPERTY ACT" by Chitaley and Annaji Rao, All India Reporter, Nagpur.

We acknowledge with thanks the receipt of the first volume of the Transfer of Property Act by Messrs. Chitaley and Annaji Rao. The learned authors have already familiarised themselves to the legal world by their commentaries on the Civil and Criminal Procedure Codes. The Transfer of Property Act is the authors' latest contribution on the subject. The volume under review shares with its predecessors the comprehensiveness and assiduous collection of all the available case-law relating to the matter. This last feature, *viz.*, that all the matter bearing on the subject in the form of all the decisions is brought in, has the effect of rendering superfluous a reference to the digests. The special features of the work have been pointedly set out in the wrapper pages. Altogether, it is a useful contribution by way of commentary upon a rather difficult branch of the law.

One word, however, as regards the citation of cases. The omission of references to provincial local journals, even of those which have a place of prime, would appear to detract from the utility of the work as a ready reference on the subject.